

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EPIC SYSTEMS CORPORATION,
a Wisconsin corporation,

Plaintiff,

-vs-

Case No. 14-CV-748-WMC

TATA CONSULTANCY SERVICES
LIMITED, an Indian corporation
and TATA AMERICA INTERNATIONAL
CORPORATION, d/b/a TCA America,
a New York corporation,

Madison, Wisconsin
October 20, 2015
2:30 p.m.

Defendants.

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STENOGRAPHIC TRANSCRIPT OF TELEPHONIC HEARING
HELD BEFORE MAGISTRATE JUDGE STEPHEN L. CROCKER,

APPEARANCES:

For the Plaintiff:

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1 APPEARANCES CONTINUED:

2 For the Defendants:

3 Kelley, Drye & Warren LLP
4 BY: MELISSA BYROADE
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8
9 Stafford Rosenbaum
10 BY: BARBARA NEIDER
11 222 West Washington Avenue, Ste. 900
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14 THE COURT: Good afternoon. This is Magistrate
15 Judge Crocker. I understand I have the attorneys for
16 both sides in the Epic Systems lawsuit against TCS or
17 Tata Consultancy Services. There's a court reporter
18 here, so we're of record.

19 The case number is 14-CV-748-WMC. And let's get
20 the appearances, please. First on behalf of plaintiff.

21 MR. RICHMOND: Thank you, Your Honor. This is
22 Rick Richmond from Jenner Block. And I also have Kelly
23 Morrison and Andrew Sullivan with me in case it's
24 necessary for them to chime in.

25 THE COURT: All right. Good afternoon to all
of you.

MR. RICHMOND: Thank you.

MS. ALEXEJUN: And Stacy Alexejun from Quarles
& Brady is also here on behalf of the plaintiff.

1 THE COURT: All right. Good afternoon to you
2 as well, Counsel. Let's check in with the defendant.
3 Who have we got on behalf of TCS today?

4 MS. BYROADE: Good afternoon, Your Honor,
5 Melissa Byroade of Kelley Drye. I'm also here with
6 Alison MacGregor of Kelley Drye. And I believe Barbara
7 Neider is also on the phone.

8 MS. NEIDER: Yes, I am, Your Honor.

9 THE COURT: All right. Well, Counsel, good
10 afternoon to you, all of you as well. Let's set the
11 stage as best we can. We've got a lot in the hopper
12 today, with more on the way next week. We've got a
13 followup on the motion docketed as 93, which at the time
14 it was presented to Magistrate Judge Oppeneer, acting in
15 that capacity, was an emergency motion. You held out or
16 he suggested you reserve for my consideration the
17 question of deposing Commander Kumar and Iyappan
18 Rathina. I want to talk about that last. I'd rather
19 deal with the two new motions first.

20 Docketed by the Court as 107 is the plaintiff's
21 motion to compel production of documents for which
22 attorney/client privilege has been claimed by the
23 defendant. Separate from that, but also on the agenda
24 today, is the motion docketed as 112, the plaintiff's
25 motion to compel a continued and more robust 30(b)(6)

1 deposition. And of course we've got briefs in support
2 and statements and exhibits in support and then briefs
3 and statements and exhibits in opposition to all of
4 these.

5 Let's start with the motion to compel production of
6 the documents for which privilege is claimed. Starting
7 with the test here, the first thing that I looked at was
8 whether or not the Court should forgive the inadvertent
9 disclosure here. And the Court in *Dellwood Farms*, the
10 128 F.3d 1122 case, I think articulated helpfully the
11 policy or philosophy around selective and inadvertent
12 waiver and the considerations the court should keep in
13 mind, and pointed out that there's three different ways
14 courts approach it and all three are accepted, which is
15 puzzling to me, but if it's a subjective approach, the
16 waiver is always forgiven. If it's an objective
17 approach, the waiver is never forgiven or the disclosure
18 is never forgiven. And then the third approach is the
19 balancing, which is between the two.

20 With the particular document at issue here, I'm not
21 going to apply an objective approach. I don't think
22 that that adequately captures the reality of what goes
23 on in businesses in the world. It's easier, that
24 certainly would cut through the Gordian Knot rather
25 decisively, but I don't think it's fair in either

1 direction. So notwithstanding Kaiser Permanente's
2 written policy, my view is that Mr. Gupta's use of a
3 Kaiser computer does not constitute waiver. So I'm not
4 going to use that as a basis to disclose it.

5 However, I don't think Ms. Byroade's proffer by
6 itself as to the attorney/client privilege suffices.
7 It's just Ms. Byroade's say-so. She's not an actor. So
8 what I'm prepared to do is give the defendant until
9 Thursday noon, October 22, actually to make the record.
10 The claim here is that Mr. Sundar prepared this
11 PowerPoint for Ms. Mukherji, if I'm pronouncing it
12 correctly, who then passed it along to in-house counsel,
13 Mr. Verghese, who apparently then passed it along to
14 Kelley, Drye & Warren after this litigation commenced.
15 If the email chain shows that this was actually prepared
16 at the direction of supervisors who wanted and then did
17 pass it along to in-house counsel, from this Court's
18 perspective that would suffice to maintain the privilege
19 here. But we need more and I want it quickly. I don't
20 want this to drag on endlessly. That said, let's get
21 some additional input here and then we'll move on to the
22 next one. But I don't really need to hear a lot.
23 You've both made your positions pretty clear.

24 On behalf of the movant, Mr. Richmond, I presume
25 that you'd like to offer your input at this point?

1 MR. RICHMOND: Yes, Your Honor. Thank you. I
2 think what Ms. Byroade has claimed is not that
3 Mr. Sundar prepared this, but that Mr. Gupta did and put
4 it on the Kaiser hard drive; either he prepared it there
5 on that hard drive or he put it there. But I think,
6 unless I misread her email, that she was saying it was
7 Mr. Gupta --

8 THE COURT: Right. I misspoke. And I
9 apologize. I'm looking at my notes. It was Mr. Gupta
10 prepared it for TCS counsel and then they're claiming
11 work product and attorney/client privilege. So you're
12 correct.

13 MR. RICHMOND: Very good, Your Honor. The
14 other thing, and it's not quite right, but if defendants
15 are going to have to give more back, they have said that
16 Kelley Drye received this purportedly privileged
17 PowerPoint "shortly after the complaint was filed" and I
18 think some precision on that would be good, Your Honor.
19 Because the complaint was filed on October 31st, 2014,
20 and nearly a month later with a report that says things
21 like "a TCS associate had access to Epic UserWeb
22 considering TCS does not have any teaming agreement with
23 Epic if access was unauthorized." So that was in the
24 report that came into Kelley Drye's hands shortly after
25 the complaint was filed.

1 About a month after the complaint was filed, Kelley
2 Drye wrote you a brief saying "According to TCS's
3 investigation to date, the claims in this action have no
4 merit and appear premised on unreliable statements by a
5 disgruntled TCS employee." And then even later than
6 that, on January 5, 2015, which was then another
7 month-and-a-half after that, so about two-and-a-half
8 months after the case was filed, they say in their
9 motion to dismiss "nor do Epic's allegations that TCS
10 access documents without authorization appear
11 plausible."

12 THE COURT: It's hard to reconcile those
13 different strands of argument, isn't it?

14 MR. RICHMOND: It certainly is, Your Honor.
15 And we've been asking for what investigations were done
16 by TCS from the very beginning of the case, Your Honor,
17 and we've just gotten stonewalling and silence. It's
18 only in the last few weeks that we've now found out that
19 there were at least two different investigative reports
20 that have been around for a really long time. They've
21 been around since the late summer of 2014. One of those
22 reports is the one that you're looking at here, the
23 other was one that was actually delivered to Kaiser and
24 given to Kaiser with no claim at all of privilege. That
25 was never produced to us. And the only way we got it

1 was very recently when we were fighting over this
2 document that TCS said golly gee, that one is
3 privileged, but look what we have here. We have a
4 nonprivileged investigative report that we gave to
5 Kaiser over a year ago and they just gave us that one.

6 So this isn't going to be the end of this issue,
7 Your Honor. There's going to be, I think, lots of
8 additional issues and matters that are going to have to
9 be resolved with respect to the investigations by TCS.

10 THE COURT: Mr. Richmond, why should the second
11 half of this case be any less contentious than the first
12 half. I look forward avidly to the motions practice.

13 MR. RICHMOND: Hope springs eternal, Your
14 Honor.

15 THE COURT: That said, Ms. Byroade, is it clear
16 what I need from you and can you meet the deadline?

17 MS. BYROADE: Yes, Your Honor, we can meet the
18 deadline.

19 THE COURT: Okay. We'll just leave it at that.
20 The burden is on the claimant of the privilege. You
21 both cited back to me my own order in *America Family*
22 *Mutual* where I'm just quoting other Seventh Circuit
23 cases. But it's a narrow privilege. It's jealously
24 guarded. Here it could be deserved. It's not clear to
25 the Court at this point from first-hand actors that

1 that's the case, but I'm prepared to give TCS the
2 opportunity to prove that up. Noon on October 22,
3 please.

4 All right. Let's move on then to --

5 MS. BYROADE: Your Honor, I'm sorry. May I ask
6 for one clarification?

7 THE COURT: Of course.

8 MS. BYROADE: Can we submit the additional
9 evidence to you incamera?

10 THE COURT: Yes, of course.

11 MS. BYROADE: Okay. Just wanted to make sure.
12 Thank you.

13 THE COURT: That's fine. If it's part of a
14 privilege, then that makes sense. So let's approach it
15 that way. And before we disclose anything into the
16 record, if we get there from here, this court's
17 practice, which I will follow here, is to let the party
18 who submitted the documents know that before they're
19 disclosed in case there has to be some sort of an
20 emergency request for reconsideration by the trial judge
21 or something like that. But let's not worry about that
22 today.

23 MR. RICHMOND: Your Honor, this is Rick
24 Richmond. I have one final thing then to think about
25 with respect to this. If they are going to try to prove

1 up their privilege with documents that I can't see, what
2 I can't have happen frankly is at the end of that
3 process to have somebody say well, I guess it's a
4 privileged document. You can never use it for anything.
5 I've now seen it and I know that the TCS in-house
6 lawyers and their outside lawyers had this investigation
7 in their hands at the very time they've been resisting
8 discovery and telling the Court in motions to dismiss
9 that these claims aren't even plausible, that it's just
10 made up, that there was no unauthorized access when I
11 know that they knew differently. So I'll need to use
12 that document no matter what in some further discovery
13 practice in front of Your Honor, whether it be for
14 sanctions under Rule 11 or whether it be for motions to
15 compel production of documents or whatever it be. So I
16 just don't want to end this process and somehow the
17 document disappears. We've all seen it and understand
18 its significance at this point.

19 THE COURT: Sure. Well, Mr. Richmond, the best
20 way I can respond to that is by offering a couple of
21 different observations. First and most immediately, I'm
22 honoring Ms. Byroade's request to submit this
23 information incamera, but frankly it's hard for me to
24 envision why any statement by the actors is privileged.
25 I mean they're just basically telling me yeah, I'm the

1 one who asked Mr. Gupta to prepare this and I asked him
2 to do that so I could show it to in-house counsel.
3 There's nothing privileged about that. To the same
4 extent if in-house counsel, Mr. Verghese, says I asked
5 for this, this was part of an in-house investigation,
6 again, that's not privileged. The fact of the
7 investigation is not privileged. But I will wait to
8 make that determination until I see what I actually get.
9 Again, and I'm repeating myself, but we are very wary of
10 granting the privilege and we don't do it any more
11 broadly than we have to.

12 So the next observation I think segues from that.
13 Mr. Richmond, you can't unring the bell here. You know
14 what you know. And without researching case law on
15 this, it's hard for the Court to offer anything with
16 precision, but I can tell you generally that we're not
17 going to let TCS use this privilege as a shield and a
18 sword. If, in fact, they were claiming things through
19 counsel that turned out to be untrue and they knew it or
20 should have known it at the time, there should be, and
21 I'm certain there will be, consequences. And we will
22 approach that at the appropriate time, as necessary, and
23 certainly you're entitled to ask for the Court to review
24 this and rule on a motion when you make it. You're not
25 forbidden from doing that by anything that we're doing

1 today. But there's really nothing else the Court can do
2 at this point other than to assure you that you do have
3 a say in what happens next.

4 You're aware the document is out there. If it is
5 privileged, you can't use it in the first instance. But
6 if we transcend the normal concept of privilege here
7 because of other litigation practice in this lawsuit,
8 it's a whole new ballgame. Does that help at all?

9 MR. RICHMOND: Yes, Your Honor. Thank you.

10 THE COURT: Ms. Byroade, again I'm not looking
11 for trouble today, but does that generally make sense to
12 you as well?

13 MS. BYROADE: Yes. Thank you, Your Honor.

14 THE COURT: All right. Let's move on then.
15 112 is the motion to compel a more robust or more
16 complete 30(b)(6) deposition. The motion as filed noted
17 three critical topics on which the designation Syama
18 Sundar was not well prepared. In response, Ms. Byroade
19 indicates that notwithstanding the fact that TCS and
20 counsel feel a little bit sandbagged by this claim,
21 they're now prepared to put on a witness and we can go
22 forward in some fashion.

23 Okay. That's a good start. But I don't want to
24 leave loose ends dangling here. I know that there was
25 umbrage taken in both directions here because the

1 parties, through email, were negotiating with each
2 other. I think they're planning hardball. Fine.
3 That's not the Court's concern.

4 But timing is a concern now. And I do want input
5 from each side. But I'll tell you this right now:
6 Understanding that everybody's busy and you've got some
7 depositions that are looming, I'm sure you've already
8 taken some of them and others are ready to go soon,
9 against my better judgment I'm going to give you an
10 extra week on summary judgment and I'm going to try and
11 avoid hurting people too badly on dates.

12 So put this in the bank. November 16 is the new
13 deadline for any sort of dispositive motion. Responses
14 by December 7. Reply by December 17. That's past the
15 edge of the envelope and into the void, but that's
16 something that I'm willing to do in order to make sure
17 that the parties don't feel like they've been
18 disadvantaged by late discovery. Okay?

19 I'll also tell you right now something I think that
20 you would surmise that although it's only an extra week,
21 there will be a ripple effect in Judge Conley's decision
22 process. He's not known for turning these around
23 quickly in any event. You just lost a week against that
24 normal submission time for the order. You'll get
25 something before the trial date. The trial date is

1 firm. But to try to take some of the pressure off of
2 both sides at this point with all of the discovery that
3 has to take place, you get the extra week now.

4 Okay. That said, I need some input as to where we
5 find ourselves now. And Ms. Byroade, I think I'll start
6 with you because I want to make sure I understand what
7 you're offering in response to the motion. Without
8 telling you what I think you said, why don't you tell me
9 where you and Mr. Richmond find yourselves today with
10 regard to the continued 30(b)(6), please.

11 MS. BYROADE: Sure. I think as I mentioned in
12 my brief, we don't agree with the release they're
13 seeking, and in a lot of cases, they're just complaining
14 because they don't the answers. And a lot of the -- I
15 think maybe all the information is already in the record
16 through other fact witnesses, so they have the
17 information to make their motion. But --

18 THE COURT: Well, let me interrupt,
19 Ms. Byroade. And I want to make sure that I'm clear on
20 this. One of their complaints was that 30(b)(6) is
21 different because it is the defendant itself, the
22 company speaking, not a witness, and we don't want any
23 evasion later. When you say that they have got it from
24 other witnesses, are those witnesses the corporation or
25 are they individual witnesses?

1 MS. BYROADE: They're individual witnesses.
2 And I do understand that and that's frankly part of why
3 we've agreed to produce someone for the topic that they
4 identified, the same topics that Mr. Sundar was
5 designated for and we working on to identify the
6 witness -- I mean I think we agreed essentially to the
7 relief they're seeking, they're just pushing on location
8 and timing.

9 THE COURT: Okay. Does the extra week help at
10 all?

11 MS. BYROADE: I think so. We had told them in
12 the emails that we'll provide somebody as soon as we can
13 in the United States at a location that's convenient to
14 the witness and we think it can be done by mid-November,
15 so I think that that does help.

16 THE COURT: Okay. Well, it's got to be before
17 -- let's be clear, Ms. Byroade. I'm not going to
18 micromanage this today, but I can micromanage it on 60
19 minutes notice if I have to. It's got to be done in
20 time for at least a rough transcript to be available
21 before November 16. Understood?

22 MS. BYROADE: Understood, yes.

23 THE COURT: Okay. Now, without meaning to
24 delve into matters that are still ambiguous, you talk
25 about a place that's convenient for the witness in the

1 United States. Can you narrow that down at all? Are we
2 talking about your same witness, Mr. Sundar, in
3 Connecticut? Are we talking about somebody in Kansas
4 City? Somebody in Encino? What can you tell us today
5 about who's in play?

6 MS. BYROADE: So it's not going to be
7 Mr. Sundar, it will be a different witness. We have not
8 -- we are still in the process of identifying who that
9 will be. It's possible they're an executive that is
10 located here, in which case it will be in New York like
11 the other depositions. If it's someone who has to come
12 from India, I think I would also say New York is more
13 convenient than Los Angeles. There's just no real --
14 the depositions have been in New York so far. Epic's
15 counsel has a office here and we think the standard is
16 (unintelligible) and so I don't really understand why
17 they're insisting on LA.

18 THE COURT: Well, I'm not going to worry about
19 location today, but I'm prepared to shift costs of
20 travel if I have to. But that's not the make or break.
21 The main thing is getting a witness named, getting the
22 appropriate documents disclosed if there are any
23 additional documents that need to be disclosed, and
24 getting the deposition in the can. Okay?

25 Ms. Byroade, anything else on that before I check

1 in with Mr. Richmond?

2 MS. BYROADE: No, that's it. Thank you.

3 THE COURT: All right. Mr. Richmond, your
4 input, please.

5 MR. RICHMOND: Thank you, Your Honor. I do
6 appreciate your extending the dispositive motion
7 deadline by a week. That does help. And I appreciate
8 your comments about cost shifting, that may help.

9 But having said all that, when we issued these
10 30(b)(6) notices on April 10, so they've been out there
11 a good long time, on June 5 TCS confirmed that they
12 would provide a witness who would be prepared to testify
13 on those topics. As we were lining up depositions to be
14 taken, one of the people to be deposed was Mr. Sundar,
15 who is a key player. He's Mr. Guionnet's boss. And in
16 trying to line that deposition up, we were told he lives
17 in Chini, India. That's in writing in front of you;
18 that he was coming here on a special visa, and that we
19 could only have him on this one day.

20 THE COURT: And lo and behold, he has been
21 living in Connecticut for the past ten years. Imagine
22 that.

23 MR. RICHMOND: Fifteen years, Your Honor. And
24 even in the week before we were going to meet with him,
25 we were saying we need more than one day; that his

1 deposition was scheduled for Friday, August 28. We
2 offered to continue it into Saturday, Sunday, Monday,
3 anything, because we believed he was in India and could
4 only be here for a short time and we knew, because he
5 had been designated for all three deposition notices,
6 that we needed more time. They declined to do any of
7 that, said let's just see how it goes.

8 At his deposition on August 28, I showed him all
9 three 30(b)(6) notices and he said "I'm ready. I'm the
10 guy. I'm the designee to testify on these subjects."

11 THE COURT: Well no, Mr. Richmond, let me
12 interrupt. That's all in your papers to the Court. And
13 I think your exasperation is merited, so I don't mean to
14 just split the baby here. Tell me what you want to
15 happen next. Apparently we don't have a witness named.
16 You want to wait and see who it is and where they want
17 it to occur and then let the Court know if that's
18 unacceptable and have the Court referee that?

19 MR. RICHMOND: I guess we could do that, Your
20 Honor. I don't know why they're not bringing
21 Mr. Sundar. He said he was the man. He was prepared.
22 They can bring another person, I suppose. I do think
23 it's wrong for them to say somebody is prepared, bring
24 them, and then make us go to New York twice for this
25 man's deposition and then say well, golly gee, he's

1 really not prepared. We'll try to find somebody else
2 and try to squeeze you and put it in right before
3 summary judgment.

4 What I'd really like, I'd like Mr. Sundar as fast
5 as we can get him, and if it's not him, somebody else as
6 fast as we can get him. We'd prefer to have it here in
7 LA. If they insist on New York, we'll do that and we'll
8 make a motion to be reimbursed for the cost shifting as
9 you've indicated.

10 THE COURT: Well, when you say --

11 MR. RICHMOND: But what I most want is for it
12 to go fast.

13 THE COURT: That's the question I want to ask
14 you. Tell me what that means to you. Quantify that.

15 MR. RICHMOND: I'm prepared to take that
16 deposition any day, Your Honor. Any weekend. Any day.
17 I'm ready to do it.

18 THE COURT: Okay. Ms. Byroade, today is the
19 20th. I'll give you a week. If you don't have somebody
20 ready to go in a week, you waive the privilege or you
21 waive the ability to put in evidence and the chips will
22 fall where they may. Understood?

23 MS. BYROADE: You mean to have the actual
24 deposition within a week?

25 THE COURT: Yes.

1 MS. BYROADE: If they have to come from India,
2 I don't know if that's possible.

3 THE COURT: Why is it not Mr. Sundar?
4 Informational question, not rhetorical. Why is he not
5 being reoffered?

6 MS. BYROADE: I mean I think it's the
7 corporation's prerogative to have who they want and I
8 don't frankly understand why Mr. Richmond is insisting
9 that it is Mr. Sundar.

10 THE COURT: Okay. But you're not answering my
11 question. Don't cross talk to Mr. Richmond's umbrage,
12 answer my question. Why is he not being offered? Is
13 that a decision because he's not a good witness?
14 Because he's not available? Something else? What's the
15 thought process here?

16 MS. BYROADE: I mean we think that he did what
17 he was supposed to do and he testified for two days.
18 That wasn't sufficient for Epic. So we're trying to
19 find another person who can be prepared and can testify
20 about the same topics.

21 THE COURT: Let's be clear. You keep saying
22 you thought he did okay, but you've already conceded to
23 me that he did not know the answers to questions that
24 the corporation needs to respond to. And you've already
25 conceded that the other witnesses may have talked about

1 these things, but not bound the corporation. So you
2 can't have it both ways. You've got to put on a
3 30(b)(6) witness who can commit the corporation, the
4 defendant, to answers.

5 Now, if you're going to bring in someone from
6 India, fine. We can do it by the end of October. If
7 it's someone in the U.S., it's got to be within seven
8 days. But October 31 is the drop-dead deadline. That's
9 a Saturday. If you don't meet it, there will be
10 consequences. Is that clear enough?

11 MS. BYROADE: Your Honor, I just want to -- I
12 did not say that -- I did not concede that he didn't
13 answer questions. That's not what I meant to say. We
14 thought we were working with them and agreed to provide
15 a witness, so we did not put in a substantive brief. So
16 this is a little bit -- you know, I think this is sort
17 of going in a different direction. But we're working to
18 identify someone and we will. We have to coordinate
19 schedules.

20 There are four depositions in the next few weeks in
21 Wisconsin that affects the schedule.

22 THE COURT: Well, I'll tell you what --

23 MS. BYROADE: I don't know that --

24 THE COURT: Ms. Byroade, you're right and I'm
25 going to back off on that. Because one of the reasons

1 I'm giving everyone the extra time, until the 16th, is
2 because you have these other depositions. What I want
3 you to do is get the name of your 30(b)(6) ASAP. I want
4 that within a week. I want that person identified to
5 Mr. Richmond and his colleagues and I want you to tell
6 him when it's going to be. If he's got a problem with
7 that and you guys can't work it out, I will referee that
8 dispute. But the thumb will be on the scale in favor of
9 the plaintiff at that point. But I'll give you the
10 opportunity to figure out who it's going to be and when
11 it's going to be, taking into account the workload
12 you've got. That's fair. Does that make sense?

13 MS. BYROADE: Yes. Thank you.

14 THE COURT: All right. Mr. Richmond, can you
15 live with that today?

16 MR. RICHMOND: I'll wait to see what they come
17 back with, Your Honor, but, you know, hope springs
18 eternal. My guess is we'll be on the phone again.

19 THE COURT: Well, we've got a hearing next week
20 already, maybe we can make it a two-fer.

21 MR. RICHMOND: There you go, Your Honor.

22 THE COURT: All right. I think that's all we
23 need to do on that one. Mr. Richmond, it's your motion.
24 Anything else today?

25 MR. RICHMOND: Not until we get the name and

1 the date, Your Honor.

2 THE COURT: Understood. All right. So let's
3 backtrack to 93. And again, I'm sort of playing catch
4 up here. But my understanding of where the parties find
5 themselves today is that defendant has agreed to provide
6 Kumar and Rathina for depositions. And if I'm wrong,
7 correct me. That's just my surmise at this point. But
8 the question is the provision of documents in advance of
9 their depositions. Maybe that's not a very accurate
10 portrayal of what's still outstanding.

11 Mr. Richmond, you're the one who asked for
12 consideration. Why don't you give me your position on
13 where we find ourselves, and then Ms. Byroade, I'll get
14 the defendants' position. Mr. Richmond, to you, please.

15 MR. RICHMOND: Thank you, Your Honor. As
16 you'll remember, Mr. Guionnet's deposition was awhile in
17 the making. It finally got underway on August 4, 5, and
18 6. During those first three days of his deposition, he
19 talked a lot about these two men, one that everybody
20 calls *Iyappan* and the other one everyone calls *Commander*
21 *Kumar*. The Commander is a title or designation left
22 over from his military service, not his name. But
23 that's what everyone calls them, *Iyappan* and *Commander*
24 *Kumar*.

25 At the conclusion of those three days, which was a

1 Thursday, the next Monday on August 10 we immediately
2 requested the depositions of Iyappan and Commander
3 Kumar. We were met with a stony deaf silence for two
4 weeks. On August 24 during a meet-and-confer session,
5 TCS finally opened its mouth and responded and said that
6 these two depositions would be tentatively scheduled for
7 September 19th in Chini, amidst a number of other
8 depositions that were going to be taken on what I'll
9 call now in hindsight the India field trip for
10 depositions.

11 We did not have documents for any of the deponents
12 that we were going to be taking on that field trip. So
13 on August 31st, we filed this emergency motion to compel
14 production of documents so that the depositions could be
15 meaningful as possible. That was heard in your absence
16 by Peter Oppeneer. So that's what this takes off from.

17 On September 3rd in response to our emergency
18 motion, TCS refused to search for documents for Iyappan
19 and Commander Kumar saying "they're not likely to have
20 any relevant information" and even the request for their
21 documents "have no legitimate basis."

22 Well, that caught Mr. Gionnett's attention when he
23 pulled up his pacer on September 3, and he promptly on
24 September 7 sent a very lengthy email refuting that
25 notion and proved beyond any peradventure that both

1 Iyappan and Commander Kumar are extraordinarily
2 important witnesses and pointed with specificity to
3 documents that prove that.

4 The final day of Mr. Gionnett's deposition on
5 October 9th, we could hardly even find a way to extract
6 from his deposition what to give you in a supplemental
7 filing to show you how important these two men are to
8 the case. Mr. Gionnett testified literally for hours
9 about those two men and their importance.

10 Boiling it down, Iyappan is somebody at TCS who has
11 responsibilities and visibility into and access to
12 everything that happens virtually within TCS. He's a
13 software architecture specialist. He has a horizontal
14 portfolio that allows him to be deeply involved among
15 others in the Kaiser account using Epic software and in
16 the Med Mantra development. He's extraordinarily
17 important.

18 Commander Kumar is the head of security. There is
19 quite a bit of indication that he himself was probably
20 either leading or a principal player in the internal
21 investigation at TCS about what happened with Epic's
22 downloaded documents, the very investigations that are
23 just coming to light in the last two or three weeks, and
24 so he's very important.

25 We have never been able to get dates for their

1 depositions until, I believe it just this morning we got
2 an email saying hey, how about if we give you these two
3 men on October 30 and 31. We don't have any documents,
4 Your Honor. That's ten days from now. I'm not sure we
5 can even -- even if we were to get all their documents
6 today, that's really pinching it. So where we're left
7 is there have been dates offered. My guess is they
8 probably don't work. I think the dates need to be
9 extended probably a couple -- a few days after that,
10 especially in light of your ruling earlier today on the
11 timing of dispositive motions. But we need those
12 doggone documents and we need them right now, and that's
13 what I'm asking for.

14 THE COURT: Okay. And when you say you need
15 those documents, tell me what it is that you've
16 requested. What's the universe here? Any documents on
17 specific topics that were part of the deposition notice?

18 MR. RICHMOND: Your Honor, this goes back to
19 all the document requests basically that we've had in
20 the case. They've never to our knowledge designated
21 either of these two men to be "custodians" of documents.
22 So they haven't searched, in my view, as far as I know,
23 they might tell me differently, they haven't searched
24 for document one in either of these men's purview. They
25 haven't looked at their emails, they haven't looked at

1 their hard drives, they haven't gone to the backup
2 servers. They've done nothing to ask these two
3 gentlemen for anything related to the case, which would
4 cover all kinds of things like comparisons between
5 Epic's software and the competitive Med Mantra software.
6 It would cover things like what internal investigations
7 were done to find out what happened with Epic's
8 documents that were improperly downloaded. It would
9 cover subjects such as what was Iyappan's role in terms
10 of getting information from the Kaiser account that
11 included all kinds of information about Epic software,
12 and what did or did he or did he not do with that
13 information with respect to Med Mantra. And it
14 potentially could involve what in the world was TCS
15 doing when it downloaded documents from Epic's UserWeb
16 having to do with a laboratory module when Kaiser didn't
17 even use Epic's laboratory module. They were stealing
18 laboratory documents, and in the same timeframe, they
19 were working with a U.S. --

20 THE COURT: Mr. Richmond.

21 MR. RICHMOND: -- company -- sorry.

22 THE COURT: Mr. Richmond, let me interrupt you
23 there. Now, you're giving your closing argument. I
24 don't need that.

25 MR. RICHMOND: It's the DaVita documents.

1 There's a laboratory in the U.S. that Med Mantra was
2 developing a laboratory solution. By the way, I can
3 offer -- this is going to come up in more motion
4 practice. For a long time TCS's position in this case
5 was why would we steal your documents. There's nothing
6 we would ever use because we don't do anything in the
7 U.S. It's now come to light that they very well do
8 things in the U.S. They are developing a laboratory
9 module with a company called DaVita.

10 THE COURT: Well, Mr. Richmond, now you're
11 digressing. I'm sure we'll have many more hearings at
12 which you and Ms. Byroade can present your diametric
13 positions on what's going on here. But let's focus on
14 what needs to happen before November 16.

15 MR. RICHMOND: They need to respond to our
16 document demands that are already out there by searching
17 Iyappan and Commander Kumar as custodians.

18 THE COURT: Okay.

19 MR. RICHMOND: So include all those documents I
20 was just talking about.

21 THE COURT: Understood. And let me ask you
22 this: Based on the current offer of October 30 and 31
23 for the depositions, where is the proposed location?

24 MR. RICHMOND: They've proposed it by video.
25 I'd much prefer to take really important people in

1 person, but the real problem is we don't have any
2 documents and that's just ten days away.

3 THE COURT: Okay. Understood. Ms. Byroade,
4 your input. And you don't have to respond to
5 Mr. Richmond's accusations of improper conduct. That's
6 not the point today. The point is getting discovery
7 taken care of. So what's your input on that, please?

8 MS. BYROADE: So I just think -- I mean first
9 of all, both of the witnesses are in India and given the
10 deadlines, that's why we proposed video conference.

11 So I'm moving to the documents. I think this is
12 like -- what Mr. Richmond just said and how rambling
13 that was about what documents he's looking for is a
14 perfect example of what the problem is with his request.
15 We've already searched 16 custodians. It's not a
16 problem searching custodians, it's a problem that
17 there's absolutely no relevance here. They're relying
18 entirely on Mr. Gionnett. Mr. Gionnett could not point
19 to any facts showing any misconduct or any involvement
20 by either of these people.

21 And I think, you know, he mentioned that he showed
22 them a bunch of documents during his deposition. What
23 actually happened is that during the course of the
24 deposition, Mr. Gionnett emailed those documents that he
25 believed are important. That's not relevant for the

1 Rule 26. I think you can look at documents, because
2 Mr. Richmond put them all in, it's like 25/30 documents.
3 Mr. Gionnett thinks that they're important, but
4 Mr. Richmond cannot point to anything in those documents
5 to make any coherent theory why these key witnesses are
6 likely to have relevant information.

7 THE COURT: Sure. Well, Ms. Byroade, let's cut
8 to the pragmatic aspect of this discussion.
9 Understanding your position, and I'm not going to take
10 sides here, but understanding your position that it's
11 all completely irrelevant and this is all going to be
12 smoke and mirrors and there will be no substance of this
13 claim later, and I get that. I understand that the
14 parties have very different views of what actually
15 happened and what it means. But how time consuming and
16 how difficult would it be to pull up the documents for
17 Commander Kumar and Iyappan Rathina regardless of how
18 irrelevant you think this process would be?

19 MS. BYROADE: You know, we have to collect them
20 from the client. Essentially the process is we get the
21 entire mail file from the client for the relevant time
22 period and then we'll have to put in our search terms,
23 and I can't really know -- I wouldn't be able to know
24 the extent of time for the review until I know how many
25 search term hits there are.

1 THE COURT: Well, give me a ballpark estimate.
2 Just what's the range that we're talking about here?

3 MS. BYROADE: I suppose it could probably be
4 collected and reviewed in the next two weeks.

5 THE COURT: In two weeks?

6 MS. BYROADE: Yeah.

7 THE COURT: Okay. Well, today is the 20th. If
8 you put the request in yet this afternoon, and I assume
9 you guys are 24-7 until the motions get filed in
10 November, if you had all of that -- and I'm just
11 thinking out loud, so Mr. Richmond, I'm not committing
12 to anything here. But I'm just looking at a calendar.
13 So that would be November 3. And Mr. Richmond, I
14 presume that you would want some time to look at this
15 stuff. We've got November 16 for the not-later-than
16 deadline.

17 If we put the depositions -- if the materials were
18 provided by the 3rd at the latest and the deposition
19 were on the 10th or the 11th, is that physically doable?
20 Ms. Byroade, I'll stick with you and then I'll check in
21 with Mr. Richmond.

22 MS. BYROADE: I think that's doable. There's
23 still the question of the location for the depositions,
24 I think, but --

25 THE COURT: Well, you might be paying for

1 Mr. Richmond to fly to India, but I'm not going to look
2 for trouble today. Let's just figure out what our time
3 frame is and then let you two meet-and-confer, hopefully
4 with more success than the past couple of email
5 exchanges. But let's nail down some deadlines first.

6 And Ms. Byroade, to your knowledge, depending on
7 location, your client can make both Commander Kumar and
8 Mr. Rathina available in November.

9 MS. BYROADE: Yes. I had checked on next week
10 and that's why we offered next week, but I think
11 November will be fine. I just -- if I can make one
12 point about the process of video conferencing.

13 THE COURT: Sure.

14 MS. BYROADE: I know when we were talking to
15 you on a different motion several months ago where Epic
16 are requested that we be required to bring all our
17 witnesses here and we were talking about the possible
18 scenario for depositions and I believe, unless I
19 misunderstood, that you actually -- it sounded to me
20 like the court was open to video conference depositions.
21 We haven't done any yet. I mean we did seven
22 depositions in India and I think six depositions in the
23 U.S., so I just think that Epic should be required to
24 consider that as a possibility.

25 THE COURT: Oh, absolutely. They don't get

1 veto power over a video deposition. I mean Rule
2 26(b)(3)(C) or (b)(1)(C)(iii) still matters.
3 Proportionality and cost haven't gone out the window,
4 notwithstanding the scope of this particular case. But
5 what I'd like to do first is figure out timeline.

6 And Ms. Byroade, last question. You're saying a
7 couple weeks. If you had to, and understanding that
8 there's a lot going on right now, do you think that
9 could be tightened up? Do you think that could be done
10 in eight to ten days?

11 MS. BYROADE: It's possible. It's just very
12 hard to say without seeing what the searches are.

13 THE COURT: Understood. All right. Well,
14 thank you for your input.

15 MS. BYROADE: It's a lot -- I'm dealing with a
16 lot.

17 THE COURT: Sure. The more the longer. Yeah,
18 I get it.

19 MS. BYROADE: Well, I wanted to make the point
20 that a lot of times with the search terms, Epic knows
21 what search terms we're running and we run them and we
22 get a huge number of hits that we look at that are false
23 hits. And there end up being a handful of responsive
24 documents. So even as we expect there won't be relevant
25 documents, but it still takes time to review.

1 THE COURT: Understood. Well, it's a sifting
2 and winnowing process, isn't it? Mr. Richmond, your
3 input, please.

4 MR. RICHMOND: Thank you, Your Honor. First of
5 all, I heard Ms. Byroade say they were just going to
6 search for mail and it needs to be much broader than
7 that. There can be PowerPoints and analyses and
8 spreadsheets that might not find their way on the
9 emails. Those might be the most important documents in
10 the case for all I know. So I want those.

11 Secondly in terms of timing, it's going to be
12 tough. I mean obviously we're pinched here. We will do
13 our level best to meet whatever deadlines the Court sets
14 and respond to that.

15 Finally with respect to searching for documents and
16 sifting through them, this is perhaps not the right
17 motion, but Your Honor, we just don't trust what's going
18 to happen, just so you know. I mean the fact that these
19 investigative reports have not been produced to us for a
20 year, I don't have a good warm feeling in my heart that
21 after eight days of pawing around and, you know, by
22 already prediction Ms. Byroade is saying we're just
23 going to have a handful of documents for you. It
24 doesn't make me feel good.

25 THE COURT: Well, we don't look for trouble

1 here. That's one of our mantras. We have a lot of
2 them, but that's one we invoke frequently. But you've
3 already mentioned Rule 11 during this telephone call.
4 That's a nuclear option. But let's face it, in many
5 lawsuits that involve a lot of information on a global
6 scale, things happen that seem bad and are not bad.
7 Sometimes things happen that seem bad and are bad. And
8 I don't know that this is all going to be shaken out and
9 in a position to put before the Court any time soon,
10 certainly not before dispositive motions. It may be
11 that over the course of time between now and April
12 things come to light that cause extraordinary alarm for
13 Epic to the point that Epic files a Rule 11 motion or a
14 37(b) motion or something like that. And we will deal
15 with that. We've had those motions in other cases and
16 the judges here are not shy about punishing a party who
17 has broken the rules or misled counsel in an
18 inappropriate way or done something else that's
19 sanctionable.

20 So Mr. Richmond, I don't blame you for being
21 suspicion. This is an adversary process. You sound
22 like you don't trust what you've learned so far and
23 you've given some examples of why you feel that way.
24 The Court does not have enough information today to take
25 sides, so I'm just going to be completely neutral on

1 that. But I just want to let you know and Ms. Byroade
2 for this matter, although she hasn't expressed the same
3 concerns, that if at any point you think that you have
4 been mistreated by opposing counsel or by the other side
5 in a way that requires court sanctions, file your motion
6 and we'll put you on the docket. If necessary, Judge
7 Conley will hold an evidentiary hearing with witnesses
8 and oral argument and we will do what justice requires
9 at that point.

10 But I also want that to be an admonition to both
11 sides to be thorough, to be fair, and to make sure that
12 your clients get it. Because if they don't, there will
13 be consequences. Maybe not immediately, but in
14 hindsight if the Court has to act later, it will.
15 Again, we're not going to look for trouble. I'd like to
16 think that this is all going to shake itself out in an
17 expedient and efficient way and that's certainly the
18 expectation today. But Mr. Richmond, if it turns out
19 otherwise, you've got the opportunity then to make your
20 motion. Understood?

21 MR. RICHMOND: Yes, Your Honor. Thank you.

22 THE COURT: Okay. That was a longer homily
23 than I intended, but I think the record will reflect
24 that we really do need to get the information out there.
25 So let's do this: Ms. Byroade, I'll give you the full

1 two weeks, but it's not just emails. I'm not going to
2 micromanage today, but you and Mr. Richmond have to at
3 least talk about the documents. But understanding TCS's
4 position that this is all just a snipe hunt and that
5 nothing is ever going to show up, at this point you've
6 got to humor Epic and if they want the documents, you
7 get the documents and they have to go out within two
8 weeks by November 3.

9 When the deposition occurs after that, I'll let the
10 parties sort that out. I'm not requiring it to be in
11 person. It may just be the timing doesn't allow that,
12 notwithstanding Mr. Richmond's preferences. If it has
13 to be by video because Mr. Richmond wants it before
14 summary judgment, that's fine. If it's too important to
15 do by video but it can't be done by the 16th, then it
16 may have to be done later. I'm not going to worry about
17 that today. The presumption is, however, that it has to
18 occur by the 11th in some fashion if Epic wants it
19 available -- wants it, plural -- the depositions of
20 these two witnesses available to use for summary
21 judgment. Beyond that, I'm not going to enter any
22 further order today.

23 I will allow the parties to ask for clarification
24 on this right now. But I think that's really all I
25 should do until you've had a chance to check with your

1 clients, check with each other, and figure out how you
2 want to approach it next.

3 Mr. Richmond, it's your motion. Is that clear
4 enough today?

5 MR. RICHMOND: I'm clear on what you've
6 ordered, Your Honor. Thank you.

7 THE COURT: Okay. Ms. Byroade, same questions
8 to you. Is it clear enough today what has to happen on
9 this one?

10 MS. BYROADE: Yes. Thank you.

11 THE COURT: I think we're done today. I think
12 we're getting back on the phone on October 28 for
13 plaintiff's October 16 motion to compel, Docket 135. I
14 don't think we've got a response to that yet. Like I
15 said, I look forward avidly to the response and maybe
16 next week you guys can give me an update on where we
17 find ourselves. With that --

18 MS. BYROADE: Your Honor --

19 THE COURT: -- I think we're done, but let me
20 check with each side. Ms. Byroade, I think you want to
21 be heard?

22 MS. BYROADE: Your Honor, I just wanted to
23 raise one issue, and part of this was addressed in the
24 papers that had been filed. But it also affects the
25 motion that was filed on Friday.

1 THE COURT: Yes.

2 MS. BYROADE: That Epic is -- obviously the
3 parties are required to meet -- make a good faith
4 attempt to resolve issues and meet-and-confer before a
5 discovery motion is filed. Epic has basically been
6 ignoring that. Some of that we put in our declaration
7 about the 30(b)(6) motion, but also the motion that was
8 filed on Friday, just one example, they're asking for
9 documents that we actually produced to them earlier on
10 Friday that they didn't bother to look at before filing
11 the motion. And they're also asking for things that
12 they've never asked for until filing the motion.

13 So I think they're trying to just get things more
14 quickly, but, you know, they should be required to
15 follow the pretrial order and the rules.

16 THE COURT: That's a fair request. And I'm not
17 going to ask Mr. Richmond to respond to it today. But
18 Ms. Byroade, if part of your response you want to show
19 that they're basically cheating on that requirement,
20 please go ahead and do that. Here's the problem we
21 often encounter, not just in this lawsuit but
22 historically, that the closer we get to a motions
23 deadline, the more urgent every discovery request
24 becomes. The Court could just take a hard line and tell
25 you to work it out between yourselves. That just

1 usually fails. Sometimes it's easier just to get on the
2 phone and referee the disputes. I'm not saying that
3 that's preferable, but it's sometimes more efficient and
4 more pragmatic.

5 But Ms. Byroade, you do have a dog in this fight.
6 If you think you're being abused, if you think
7 Mr. Richmond and his colleagues are filing motions too
8 soon and not checking for you and they've got no basis,
9 ask for relief and you're entitled to relief if it turns
10 out that this is a situation where more should have been
11 done before the motion was filed. Does that help at
12 all?

13 MS. BYROADE: Thank you, Your Honor.

14 THE COURT: Mr. Richmond.

15 MR. RICHMOND: Your Honor, people in glass
16 houses shouldn't throw stones. So if Ms. Byroade wants
17 to make that argument, we'll prove it wrong and show
18 where she hasn't asked for meet-and-confers. But we'll
19 leave that for next week.

20 THE COURT: We get one or two cases every year
21 that are just the problem children of the court and I
22 think this case qualifies. I think this is our seventh
23 or eighth hearing on discovery issues. Next week will
24 be the ninth, I believe, maybe the tenth. I'm not sure.
25 I don't expect it to get better. Frankly I'm not sure

1 that ordering the parties to try to get along better
2 would have any effect here.

3 So we'll just muddle through one motion at a time.
4 All right? Do the best you can. We're done for today.

5 MR. RICHMOND: Thank you, Your Honor.

6 (Proceedings concluded at 3:24 p.m.)
7

8 * * * * *

9 I, LYNETTE SWENSON, Certified Realtime and
10 Merit Reporter in and for the State of Wisconsin,
11 certify that the foregoing is a true and accurate record
12 of the telephonic proceedings held on the 20th day of
13 October 2015 before the Honorable Stephen L. Crocker,
Magistrate Judge for the Western District of Wisconsin,
in my presence and reduced to writing in accordance with
my stenographic notes made at said time and place.
Dated this 23rd day of October 2015.

14

15 /s/_____

16 Lynette Swenson, RMR, CRR
17 Federal Court Reporter
18
19
20

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